

BUSINESS LAW SECTION

CORPORATIONS COMMITTEE

COMMITTEE MEETING MINUTES FOR DECEMBER 7 , 2001

**Marriott Hotel (Los Angeles Airport)
Friday, December 7, 2001
10:00 a.m.**

A regular meeting of the Corporations Committee (the "Committee") of the Business Law Section of the State Bar of California was held at the Marriott Hotel (Los Angeles Airport) on December 7, 2001. Attendance was as follows:

MEMBERS PRESENT:

Keith Paul Bishop
David S. Caplan
John C. Carpenter
Nelson D. Crandall
Bruce Dravis
James K. Dyer, Jr.
Teri Shugart Erickson
Timothy J. Fitzpatrick
James F. Fotenos
Steven K. Hazen
Mark T. Hiraide

MEMBERS ABSENT:

Cynthia Ribas

Carol K. Lucas
Eileen Lyon
B. Keith Martin
Brian D. McAllister
Ethna M. Piazza
David M. Pike
Randall B. Schai
James R. Walther
Daniel J. Weiser
Neil J Wertlieb
Nancy Wojtas

LIAISONS PRESENT:

Lawrence Harasym, NASD
Todd Vlaanderen, Secretary of State

GUESTS PRESENT:

Bradbury R. Clark, Nonprofit Organizations Committee
Albert J. Hillebrand, Corporate Law Department Committee
Joanne Rocks, Partnerships and LLC Committee

The minutes summarize discussions primarily in the order items were listed on the Agenda for the meeting previously circulated to members of the Committee, which is not necessarily the order in which the items were actually taken up at the meeting. The Committee did not take up those topics listed on the Agenda which are not described in these Minutes.

I. ADMINISTRATIVE MATTERS.

A. Opening Remarks and Announcements. The meeting was brought to order by Co-Chair James Walther at approximately 9:30 a.m. Neil Wertlieb then introduced Committee members to the group. Mr. Wertlieb noted that the January 4, 2002 meeting of the Committee will be held by videoconference, with locations at Mayer Brown & Platt in Palo Alto and Milbank, Tweed in Los Angeles. Mr. Wertlieb also said that the Committee meeting on March 1, 2002 will be held in

Sacramento and will include a lunch with members of the Partnership Committee and invited guests from the state legislature. Mr. Wertlieb also requested that Committee members with materials that might be of interest to other members forward them to Mr. Wertlieb to be included in the monthly meeting package. In addition, Mr. Wertlieb asked members to consider potential topics and speakers for MCLE presentations in connection with Committee meetings later in the year, after the Committee's legislative work has been substantially completed for the year.

B. Approval of Minutes of November 2, 2001 Meeting. The draft minutes of the meeting of the Committee held on November 2, 2001 and previously circulated to the members were approved with minor changes.

II. LIAISONS' REPORTS AND DISCUSSION.

A. Secretary of State. Todd Vlaanderen introduced himself as the liaison from the Secretary of State's office. He reported that SB324 will be effective as of January 1, 2002. He noted that this new legislation, which eliminates the need to obtain a tax clearance certificate for certain merger filings, applies only to the merger of a domestic stock corporation into a domestic surviving stock corporation or a surviving foreign stock corporation qualified to do business in California. SB324 does not apply to nonprofits or other business entities. Mr. Vlaanderen also reported that the Secretary of State's office is working on posting to its website filing tips and "do's and don'ts" regarding filing and review of Articles of Incorporation.

B. NASD. Lawrence Harasym summarized recent activities of the NASD. He reported that the NASD recently issued NASD Notice to Members 01-72 regarding continuing education requirements for member firms. He also suggested that members check the NASD web site for recent developments and noted that the NASD has a new web site for continuing education (<http://www.securitiescep.com>). Further, Mr. Harasym encouraged members to contact him if they have any questions regarding NASD rules or practice.

C. Nonprofits Committee. Brad Clark reported that the Nonprofits Committee is monitoring the work of the Law Revision Commission regarding unincorporated associations.

D. Corporate Law Departments Committee. Eileen Lyon reported that the Corporate Law Departments Committee was meeting at the same time as this meeting of the Committee and that she would report next month as to recent developments with that committee.

E. Partnerships and LLC Committee. Joanne Rocks introduced herself as the new liaison from the Partnerships and LLC Committee. She reported that the committee had met the preceding day and is putting together a guidebook for LLC filings with the Secretary of State and is also starting work on revising the Uniform Partnership Act. She suggested that members check the LLC Committee's website for recent developments. Steve Hazen, also a member of that committee, reported on the committee's work to review interspecies mergers and suggested that one approach might be to establish one section in the Corporations Code for all interspecies mergers, conversions and exchanges (the "junction box" approach). Mr. Hazen noted that Chip Lyon at Morrison & Foerster in Palo Alto is actively involved with this issue. Mr. Hazen also commented that the Partnerships and LLC Committee distributes a large volume of material and that he would coordinate with Mr. Wertlieb to distribute to members of this Committee those materials that might be of interest to members. Ms. Rocks suggested that it might be beneficial to permit members to access the password-protected portion of the Partnerships and LLC Committee web site to review that committee's materials as well.

F. UCC Committee. Jim Dyer reported that the UCC Committee had met earlier in the week. He reported that the committee continues its work on developing a model control agreement for deposit accounts, which will be published in the California Business Law News or the ABA Business Lawyer, when completed. He noted that the UCC Committee is also monitoring the implementation of new UCC Article 9.

G. Health Law Committee. Carol Lucas reported that the Health Law Committee has had two meetings and will meet again in January. The committee is in the process of organizing how the committee will work, developing a mission statement for the committee and determining what issues the committee should focus on. The committee's constituency includes both attorneys and the general public. For example, the committee is developing a list of health care resources in California that will be distributed to the general public. Ms. Lucas stated that the Health Law Committee would probably be most beneficial to members of the Business Law Section if it provides educational materials and programs for the business lawyer who deals with health care issues occasionally, since health care issues are complex and create the most problems for practitioners who only deal with health care issues infrequently.

III. PENDING LEGISLATION/AFFIRMATIVE LEGISLATIVE PROPOSALS.

A. Report of Legislative Liaison. Mr. Fotenos said there were no new legislative activities to report on.

B. SB399 (corporate conversions). Mr. Wertlieb reported that this bill was held up during the last legislative session because of a requested change from legislative staff that creditors of an entity converting to a corporation receive prior notice of the conversion. The Committee objected to this change, since it appeared to add a level of uncertainty to the conversion process. Mr. Wertlieb noted that he had contacted the Insolvency Committee about the requested change, but had not yet received any input from that committee. Mr. Wertlieb also reported that it had been suggested that, to minimize the uncertainty associated with the proposed notice provision, a monetary fine be the sole remedy for failure to comply with the proposed notice to creditors. This would assure that a conversion would be effective despite the lack of notice, although a fine would be assessed for noncompliance. Members discussed this approach. Mr. Fotenos said that the fine would go to the state and not the entity's creditors, so there was no real benefit to the creditors. Mr. Bishop said that the idea of a monetary fine was not the best approach, but might be a means to reaching a compromise. Mr. Walther also did not like the idea of a fine and, instead, suggested a "good faith efforts" standard. Mr. Wertlieb said that he needed some guidance from the members as to how the Committee should proceed with SB399 in the upcoming legislative session in January. Members concurred that the group working on the SB399 proposal should have the authority to develop an acceptable resolution of the issue with the various constituencies (legislative staff, Department of Corporations, etc.).

C. Section 25102(o) Emergency Regulation Comments. Tim Fitzpatrick reported that Suzanne Graeser has sent comments to Tim Le Bas at the Department of Corporations regarding the emergency regulations. Mr. Wertlieb said that Ms. Graeser would like additional Committee members to assist her in commenting on the emergency 25102(o) regulations. Brian McAllister and Mark Hiraide volunteered to assist.

D. Section 710 (sunset on supermajority approvals). David Pike reported that the legislative proposal regarding amendments to Section 710 was with Larry Doyle. He stated that he had spoken with Terry Miller in Mr. Doyle's office and that the Department of Corporations has reviewed the proposal and had no comments. Messrs. Doyle and Miller are now seeking a sponsor for the proposal. They anticipate introducing the proposal in January with hearings to be held before the Senate Judiciary Committee in March or April.

IV. POTENTIAL AFFIRMATIVE LEGISLATIVE PROPOSALS.

A. Secretary of State Fax Filings. Mr. Dravis reported that he had telephoned Kathy Mitchell at the Secretary of State's office to get the fax filing project back on track and is waiting to hear back from her.

B. Section 25102(n) (remove notice as condition to exemption). Mr. Fitzpatrick said he would contact Tim Le Bas about this proposal and will prepare a report for next month's meeting.

C. Section 25118(b) (definition of aggregate evidence of indebtedness). Mr. Weiser reported that he is still searching for legislative history or other indications of legislative intent before determining whether a legislative proposal to amend Section 25118(b) is advisable. He stated that he has telephoned Jerry Grossman at Dewey Ballantine to get more background with respect to the original legislative intent in enacting Section 25118.

D. Amend Corporations Code to Permit Electronic Communications to Constitute a "Writing". Ethna Piazza reported that she is collecting information with respect to legislation in other states regarding the use of electronic communications. She stated that she would like to develop a legislative proposal by January or February. Ms. Piazza asked that anyone representing a Delaware corporation using various forms of electronic communication contact her so she can collect "real world" examples of corporations using electronic communications. Mr. Bishop commented that certain provisions of the Corporations Code require a "signed writing" while other sections require a "written consent." There may be an argument that "written consent" encompasses various forms of electronic communications without a formal manual signature. Mr. Walther suggested that broadening the definition of a "writing" in Corporations Code Section 195 to include electronic transmissions may be a productive approach. Mr. Bishop stated that the current definition in Section 195 is not exclusive ("written" or "in writing" includes facsimile and telegraphic communications) and, as written, may permit electronic transmissions. Mr. Fotenos noted that this issue cuts across the work of several committees and that the Committee should consider getting other committees involved.

E. Amend Finance Lenders Law. Mr. Bishop said that he would prepare a report for next month's meeting. Mr. Bishop noted that California consumer law provides that a willful violation of the finance lenders law results in the contract being void and a non-willful violation results in all interest being forfeited. He noted that some may argue that this provision is applicable to all loans, not just consumer loans, despite the fact that these penalty provisions are in a section of the law that only refers to consumer loans in its caption. One approach may be to limit this provision to consumer loans. Mr. Bishop will report in more detail next month.

V. WEB SITE PROJECTS.

A. Web Site Update. David Caplan reported that much new material has been submitted for posting on the Committee's web site and is with the State Bar being formatted prior to posting on the web site. Mr. Caplan also noted that the web site would be a good place to archive materials from the Committee and asked that all such materials be forwarded to him. Mr. Caplan also reported that he has established a database with email addresses of Committee constituents so he can do mass mailing emails for new developments, if the Committee chooses to do so.

B. Posting of Law Firm Communications/Advisories to Clients. Mr. Caplan also said he had received one law firm memo from Nancy Wojtas, but would like to receive a few more before he establishes a separate page for law firm communications. Law firm communications can be in either Word or PDF format and should be sent to submissions@reorglaw.com. Mr. Wertlieb suggested that members contact people in their firms who received the letter from the Committee requesting submissions of law firm communications and follow up to see if firms will provide materials for the Committee web site.

C. Recent Developments Page. Mr. Weiser noted that the SEC has issued a new release (Release No. 33-8039) regarding pro forma financial information that might be a good addition to the "recent developments" section of the Committee web site.

VI. OTHER PROJECTS.

A. Opinion Project. Nelson Crandall led a discussion of the revised outline of the report distributed to Committee members. Working groups were established as follows:

The law and practice of opinion letters, inappropriate requests, and special issues

Bishop, Keith	LA
Erickson, Teri, Chair	SV
Lyon, Eileen	LA
Schai, Randall	SF
Weiser, Dan	SV
Wertlieb, Neil	LA

Matters pertaining to research and investigation and matters of scope

Carpenter, John, Chair	LA
Dyer, Jim	Sacto
Fotenos, James	SF
Hiraide, Mark	LA
Wojtas, Nancy	SV

Corporate status, power and authorization, and stock

Dravis, Bruce, Chair
Fitzpatrick, Timothy
McAllister, Brian
Ribas, Cynthia
Walther, James

Sacto	Blake, Steve
SD	Hazen, Steven
SV	Martin, Keith
LA	Piazza, Ethna
LA/SV	Pike, David, Chair

Contract formation, remedies (in conjunction with the BLS Task Force), no conflicts, absence of litigation, and nonstandard corporate opinions

Sacto
LA
SB
SD
SV

Mr. Crandall said that each group should meet this month either in-person, by telephone or email to establish how each group will operate and to allocate responsibilities for completing the work on their portion of the opinion report. Mr. Crandall also said that he would distribute a revised draft of the opinions project outline highlighting the sections each working group will be responsible for. Mr. Crandall requested that group leaders report to him one week before the next meeting of the Committee with the status of the work completed by each of their respective groups. Mr. Crandall also said that he would distribute to members by email a PDF file with copies of relevant opinion source materials.

B. Guide to Organizing a California Corporation. Ms. Lyon said that the working group for the guide had a conference call this week to reorganize the project and assign new members various tasks. The group is revisiting the scope of the Guide and may add or drop certain sections. The group anticipates completion of the Guide by September of next year.

C. Investment Advisors Exemption. Mr. Bishop reported that the Department of Corporations will be issuing regulations in response to comments by the end of this month.

D. California Law re: Director Duties to Creditors and Shareholders. Dan Weiser led a discussion of a proposal to reconsider a director's fiduciary duty to creditors and shareholders of an insolvent corporation. Mr. Weiser stated that case law around the country assumes a general fiduciary duty owed by directors to creditors of an insolvent corporation. One Federal Bankruptcy Court construing California law (*In re Jacks*, 4 Cal. Bankr. Ct. Rep 79 (USBC C.D. Cal. 1999)), however, has held that a director's fiduciary duty to a creditor of an insolvent corporation should be limited to the specific obligations of a director set forth in Corporations Code Sections 166, 315, 316, 500 and 501. Mr. Weiser suggested that the Corporations Code should be amended to clarify what a director's fiduciary duty is when a corporation is insolvent. He proposed that we consider whether and to what extent the Corporations Code be amended to limit a director's fiduciary duties to those set forth in Sections 166, 315, 316, 500 and 501, confirming that common law causes of action with respect to directors' fiduciary duties did not survive the 1976 amendment of the Corporations Code or explore pursuing other limitations upon such duties. Mr. Weiser discussed an example of a privately-held company in the process of being restructured to illustrate the questions that arise in this area.

Mr. Wertlieb asked the members if this is an issue that the Committee should formally pursue, either by a legislative proposal, article or other commentary. Mr. Walther said that this is an

important issue, but it might be advisable to start with an article or report of the Committee to raise the level of awareness with respect to this issue and then follow with a formal legislative proposal. Mr. Wertlieb concluded by stating that any member interested in working on this issue should speak directly with Mr. Weiser before the next meeting and develop a game plan for moving forward with this issue. Messrs. Caplan, Dravis and Fotenos said that they would be interested in working on this issue.

The meeting was adjourned at approximately 12:30 p.m.

/s/ David M. Pike
David M. Pike
Secretary

Corporation Committee Meeting Minutes

